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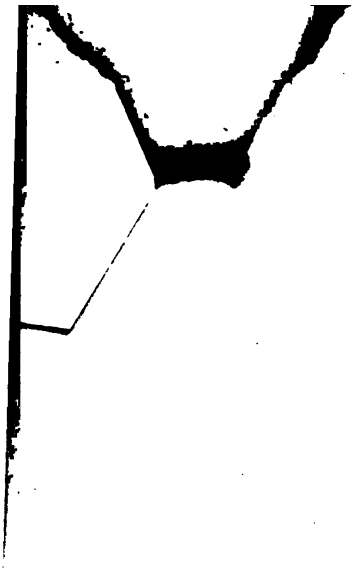

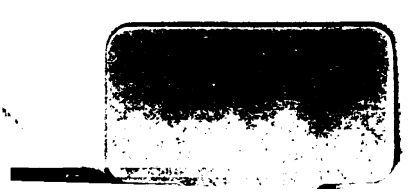

MESSAGE

OF

GOVERNOR CONRAD BAKER

TO THE

GENERAL ASSEMBLY

OF THE

STATE OF INDIANA.

TRANSMITTED JANUARY 6, 1871.

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MESSAGE

OF

GOVERNOR CONRAD BAKER,

DELIVERED JANUARY 6, 1871.

Gentlemen of the Senate and House of Representatives:

Since the last adjournment of the General Assembly the Divine Providence has continued to smile upon the State, and the year that has just closed has been crowned with many blessings to her people.

STATE DEBT.

It affords me great pleasure in again welcoming the Representatives of the people to these Halls of Legislation to greet you at the outset with the assurance that the financial condition of the State, so far at least as the liquidation of our foreign indebtedness is concerned, is most satisfactory. Practically all the foreign debt of the State, except $178,000 of the War Loan Bonds issued under the legislation of 1861, has been redeemed. So early a consummation of such a result was not anticipated two years ago, even by the most sanguine. It was then believed that the collection and application of the revenue for the year 1870 would be necessary to complete the redemption of the two and one-half and five per cent. certificates of State stock outstanding, and consequently that a portion of these stocks would have to continue to bear interest until the summer or fall of 1871. The result achieved is due to the fact that, in June last, I received from

the Treasury Department of the United States on account of the eleventh instalment of Indiana War Claims against the United States, a draft or warrant on the Assistant Treasurer of the United States, at New York, payable to my order in my official capacity, for the sum of four hundred and sixty-four thousand nine hundred and twenty-three dollars and twenty-four cents ($464,923.24), which draft or warrant I immediately indorsed so as to make it payable to the Board of State Debt Sinking Fund Commissioners of the State of Indiana, upon the joint indorsement of Nathan Kimball, Treasurer of State, and Thomas C. Slaughter, Agent of State. I transmitted the warrant thus indorsed by the hands of the Treasurer of State to the Agent of State with the request that the proceeds of the draft should be applied in redeeming, first, such of the War Loan Bonds of the State as might be presented, and, secondly, to the redemption of the two and one-half and five per cent. certificates of stock still outstanding. The proceeds of the draft were applied accordingly, and hence the favorable condition of our foreign indebtedness before mentioned.

The Auditor of State, in his report, shows that at the end of the fiscal year, on the 31st day of October last, the foreign indebtedness of the State amounted to..... $433,240 12
And the domestic indebtedness to..... $3,734,247 82

Making a total of.....$4,167,487 94

Of the $433,240.12 of foreign indebtedness thus reported, the sum of $254,240.12 consisted of five and two and one-half per cent. certificates of State stocks then unsurrendered as follows:

Five per cents.....$249,219 99
Two and one-half per cents..... 5,020 13

Total.....$254,240 12

On the first day of July, 1870, the Board of Commissioners of the State Debt Sinking Fund notified the holders of the five per cent. certificates of stock to present them at the agency in New York for payment, on or before the 1st day of September, 1870, and that in default of such presentment the State would cease to pay interest thereon after said last mentioned date. The interest on the two and one-half per cents had been stopped long before by the Board, because of their non-presentment for payment un-

der a like notice. As the money is, and has been, in the Treasury of the Agency at New York for the redemption of all these five and two and one-half per cent. stocks still unsurrendered, and as the State has done all that can be reasonably required to procure their surrender, they should be treated and considered as practically paid, and to that end I recommend that the General Assembly ratify, if such ratification shall be thought necessary, the action of the Board of State Debt Sinking Fund Commissioners in stopping the interest on these five and two and one-half per cent. certificates.

Since the end of the fiscal year, and up to January 5th, 1871, the following State stocks have been redeemed, viz.:

Of the five per cent. certificates $106,919.99 reducing the amount still unsurrendered to.....	$142,300 00
Of the two and one-half per cents $1,288.13, reducing the amount still unsurrendered to.....	$3,732 00
Of the War Loan Bonds $1,000, reducing the amount of these Bonds still outstanding to the sum of.....	$178,000 00
The principal of the War Loan Bonds will not be due for many years, and, therefore, the State can neither compel their surrender nor stop the interest thereon. Treating the five and two and one-half per cents as practically paid, for the reasons already assigned, it follows that the entire recognized foreign debt of the State consists of War Loan Bonds to the amount of.....	$178,000 00
The domestic debt of the State has been increased since the end of the fiscal year, October 31st, 1870, by the redemption of State indebtedness with moneys belonging to the Sinking Fund from $3,734,267 82 to.....	$3,792,601 15

It follows, therefore, that the debt of the State, foreign and domestic, on the 5th day of January, 1871, may be stated thus, viz.:

FOREIGN DEBT.

War Loan Bonds.....	$178,000 00

DOMESTIC DEBT.

Non-negotiable bonds given to the School Fund....	$3,551,316	15
Sinking Fund moneys applied to redemption of State debt for which no non-negotiable bond has yet been given to School Fund.....	177,700	00
Vincennes University Bonds.....	63,585	00
Total domestic debt.....	3,792,601	15
Entire debt, foreign and domestic, on the 5th day of January, 1871.....	3,970,601	15

STATE AGENCY AND BOARD OF STATE DEBT SINKING FUND COMMISSIONERS.

The Act approved December 21st, 1865, commonly called the State Debt Bill, provides for the abolition of the office of Agent of State as soon as all the five and and two and one-half per cent. certificates of State Stock shall be redeemed and canceled.

The probability is that some of these certificates have been destroyed, and will, therefore, never be presented; if so, the agency, under this legislation, would be perpetual.

There is no longer any necessity for the State Agency, or for the Board of State Debt Sinking Fund Commissioners, and I therefore recommend that both be immediately dispensed with. There will be no injustice or impropriety in requiring the holders of the few remaining certificates to receive their money at the Treasury.

By reason of the application of the money received from the United States to the redemption of our foreign debt, as before stated, the ten per cent. State Debt Sinking Fund tax for 1870, will not be required when collected for the purpose for which it was levied. It will amount to over $600,000, and as the law now stands would go into the hands of the Board of State Debt Sinking Fund Commissioners. Provision should be made for constituting the proceeds of this tax a part of the General Treasury of the State, to be appropriated as the General Assembly may direct.

OLD INTERNAL IMPROVEMENT BONDS.

In the foregoing statement of the indebtedness of the State, I have not included as a part thereof one hundred and ninety-one (191) old Indiana Bonds issued for Internal Improvement pur-

poses prior to the year 1841, and upon which no interest has been paid by the State since said last mentioned year, except as hereinafter stated. All of these 191 bonds are believed to be what are technically known as Internal Improvement Bonds—that is, bonds issued under the General Internal Improvement Act of January 27, 1836, except sixty-nine of them. These sixty-nine bonds last mentioned are Wabash and Erie Canal Bonds, held by the United States as an investment for certain Indian tribes, and the interest thereon was in November, 1868, settled up to the first day of July of that year, by the Government withholding and applying to that purpose so much of the audited and allowed war claims of the State as was necessary to pay such interest, as is fully explained in my regular message delivered at the opening of the last General Assembly, and to which you are respectfully referred.

A part of the 191 bonds before alluded to are dollar bonds, and a part sterling bonds, but the precise number of each kind I have been unable to ascertain. The dollar bonds are for $1,000 each, payable in New York City, and the sterling bonds are for two hundred and twenty-five pounds sterling each, payable in London. These bonds may be safely estimated at $191,000, exclusive of interest and exchange. John W. Garrett, Esq., of Baltimore, is represented to be the owner of 41 of these 191 bonds; ten of the 41 being sterling bonds and the residue being dollar bonds. Mr. Garrett, soon after the adjournment of the last special session of the General Assembly, as the holder of these 41 bonds, commenced an action in the Circuit Court of Carroll County, in this State, against the Board of Trustees of the Wabash and Erie Canal, for the purpose of enforcing against said canal and its revenues in the hands of said Board of Trustees, a lien on the canal which he insists was created to secure the payment of said bonds, by the provisions of the General Internal Improvement Act before mentioned.

The suit is brought not only for the benefit of the plaintiff, but for the benefit of all other persons standing in the same relation, and holding similar bonds. Soon after I was informed of the pendency of this action, I procured a transcript of the record thereof, with a view to considering what steps, if any, were necessary to be taken to protect the interests of the State in relation to matters connected with the litigation.

Upon an examination of the General Internal Improvement

Act of January 27, 1836, and the case of the Trustees of the Wabash and Erie Canal *vs.* Beers, decided by the Supreme Court of the United States in 1862, and reported in 2d Blackf's Reports, page 448, I became satisfied that the bonds issued by authority of said act were, by the 9th section thereof, charged as a lien upon all the public works of the State, including the Wabash and Erie Canal, or at least that part of it which is situated below or south of the mouth of the Tippecanoe river. In this view of the subject, it became my duty to the State, to prevent, if possible, the rendition of any decree under which the Board of Trustees of the Wabash and Erie Canal could be divested of the control of the canal or its revenues until after the meeting of the General Assembly, so that provision might be made to protect the trust and the interests of the State in any and every possible contingency that might arise. Accordingly I employed counsel, and attended the court in person, accompanied by such counsel, and co-operating with Hon. D. D. Pratt, who acted as the attorney of the canal trustees, a defect of parties defendant was pleaded, in omitting to join the present owners of the other public works embraced in the lien. This course rendered it necessary that the plaintiff should continue the cause to bring the additional parties before the court, and it was continued to the February term, 1871, of said court. The White Water Valley Canal, twenty-seven miles of the south end of the Madison and Indianapolis Railroad, the New Albany and Vincennes Turnpike Road, and that part of the northern division of the Central Canal which is situated in Marion county, are all included in the lien, and all of them, except the White Water Valley Canal, having been aliened by the State before the State conveyed the Wabash and Erie Canal to the trustees under the Butler bill, it follows that they would have to be applied to the satisfaction of the lien before the Wabash and Erie Canal could be subjected to the payment of any portion of said lien.

The White Water Valley Canal was aliened before the Wabash and Erie Canal was transferred to the Trustees, and consequently said last named canal would be liable in equity to be subjected to the satisfaction of the common lien before the White Water Valley Canal could be reached. I suppose it is certain that the other works liable to be subjected to the sasisfaction of the lien before the Wabash and Erie Canal could be reached would not satisfy the entire lien, and if they would that the State having

sold these other works for a valuable consideration, ought to protect them from the enforcement of this lien against them. If these bonds are a lien on the Wabash and Erie Canal, as I believe them to be, the State can not afford to permit the title of the Trustees to be divested or their possession and control of the canal and its revenues to be interrupted by the judicial enforcement of said lien. To prevent this, provision should be made to pay out of the Treasury of the State such of said 191 bonds as may be adjudged to be a lien on the canal and its revenues whenever it may become necessary to make such payment in order to prevent the canal or its revenues from being subjected to the satisfaction of the lien. Indeed, independently of this lien altogether, I do not see how the State can honorably refuse to redeem these few outstanding Internal Improvement Bonds. They were issued by the State, and the faith of the State was pledged for their redemption, and this pledge cannot be disregarded or set aside without the consent of both parties to the contract, if the State has the ability to redeem the pledge, of which there can be no doubt. If the holders of the bonds had surrendered them under the Butler Bill, as other holders surrendered theirs, and agreed to look exclusively to the revenues of the canal for one-half of their debt, this would have been a new contract, and the State could not be justly complained of for insisting on its execution. But the holders of the bonds now under consideration have continuously refused to surrender them under the adjustment proposed by the Butler Bill, and the State can not compel them to do so, nor can she refuse to pay them without repudiating her plighted faith.

If the State should stand by and permit the canal or its revenues to be wrested from the hands of the Canal Trustees, to satisfy a paramount lien created by the State itself prior to the conveyance of the canal to said Trustees, then, indeed, might the holders of the canal stocks, with some show of reason, claim that the State should redeem the many millions of dollars of canal stocks which, under the existing arrangement, are exclusively charged upon the canal, and for which the State is in no way bound. I hope that you will promptly adopt such measures as will forever prevent the possibility of the trust being disturbed or impaired by the enforcement of this lien. It is both right and expedient that the State should thus protect the trust property; and I also recommend that the State relieve

the Board of Canal Trustees from all the expenses of litigation to which they have been or may be subjected in defending the trust property from the attempt made to subject it to the satisaction of said lien.

I herewith respectfully submit the professional opinion of Messrs. Hendricks, Hord and Hendricks, the attorneys employed as aforesaid, touching the questions involved in and connected with said litigation, with my letter to them, containing the questions to which said opinion is a response.

CANAL DEBT.

In this connection I desire again to call attention to a renewal of the effort which is about to be made by the holders of the Wabash and Erie Canal stocks to induce the General Assembly to charge the payment thereof on the Treasury of the State.

In 1857, in anticipation of an attempt which it was rumored would then be made for the accomplishment of the same object, the General Assembly passed a joint resolution, approved February 19, 1857, declaring that the Legislature has no power under the Constitution to purchase the Wabash and Erie Canal, and that if the power existed, it would be unwise, impolitic and injurious to the best interests of the people of the State to purchase said canal. This resolution, although not very aptly worded, was intended to anticipate and condemn an expected effort to have the canal debt chargod by legislative action on the State treasury.

Early in the month of March, 1857, and a few days before the adjournment of the General Assembly, the holders of the canal stocks transmitted a memorial through the Governor to the General Assembly, in which they attempted to show that the State by her own acts had rendered herself liable for the payment of said stocks. This memorial had been, however, before its reception, anticipated and responded to by the passage of the joint resolution before mentioned, and that response still remains on the statute book as the unrepealed expression of the Legislative will on the subject to which it relates. The holders of the canal stocks or their agents, have recently caused a new edition of this same memorial to be printed in pamphlet form, copies of which, with other publications having the same object in view, have been transmitted by mail to all the members of the present

General Assembly, as I am informed, and to the executive officers of the State, including myself.

This memorial and the accompanying publications entirely concur in the object sought to be attained; but, not only disagree but contradict each other as to the basis on which the rights of the memorialists and the liabilities of the State are predicated.

The memorial in several places, either in terms or by the clearest implication, concedes that by the adjustment of 1847, one-half of the former debt of the State ceased to be a State debt, and became a canal debt, chargeable exclusively upon the Wabash and Erie Canal, its lands and revenues; but insists that, after the making of the arrangement, and by the violation thereof, the State revived her own liability by authorizing the building of railroads which carried freight and passengers that would have been carried, in the absence of such railroads, by the canal, thereby impairing the revenues of the canal to such an extent as to render it practically worthless as a security.

The publications which accompany the memorial, deny the concessions made by the memorial, and assert that by the adjustment, the State never was released from her liability to pay that half of the former debt of the State which was charged upon the canal. I propose to notice both of these theories, and in doing so, I shall, for convenience sake, submit what I have to say in support of the two following propositions, viz.:

1st. That by the terms of the acts of January 19, 1846, and January 27, 1847, commonly called the "Butler Bill," and the nature of the negotiations which resulted in their adoption, and especially the amendments suggested by the principal bondholders, to the first act, and adopted in the second; the character of the bonds surrendered, and the certificates of canal stock issued and received in lieu thereof; and, by the cotemporaneous and subsequent construction put upon the adjustment by both parties thereto, it is clear that the canal stocks, which the State is now asked to charge upon her Treasury, were to be, and were, charged exclusively upon the Wabash and Erie Canal, its lands and revenues, and that the State was not to be, and was not, bound to pay any portion of these stocks, although she reserved the right to redeem the canal at her option, after the expiration of twenty years from the date of its transfer to the Trustees, by

paying the principal sum charged upon it, to the holders of the certificates of the stock thus charged.

2d. That the State has not, since the adjustment of 1847, by the incorporation of railroad companies, and authorizing them to construct railroads within the State, or by any other act of hers, according to any recognized rule of law, or any established principle of equity jurisprudence, created a liability on her part to pay said canal stocks, or any part thereof. In other words, had the same transactions occurred between two natural persons, over whose rights and liabilities the Courts could have exercised the fullest jurisdiction, the claims now urged against the State could not have been enforced as between these natural persons by an action at law, or a suit in equity.

Before presenting any argument in support of said first proposition, it may be well to premise that prior to the adjustment of the State debt, under the Butler Bill, Indiana was hopelessly embarrassed, her indebtedness then being largely above and beyond her ability, present or prospective, to pay. At the same time, the State owned the Wabash and Erie Canal, in an unfinished condition, with 800,000 acres of land lying within the State, which Congress had donated to the State to enable her to complete said canal. Under these circumstances it was not a matter of choice, but of absolute necessity, that, to enable the State to resume the payment of interest on her indebtedness,—which had been suspended in 1841—her Treasury must be relieved in some way from the payment of some part of the debt which was then a charge upon it.

The creditors of the State, or a large number of them, conceding the existence of this state of affairs, deputed Charles Butler, Esq., of New York, to visit the State Capitol during the session of the Legislature, and confer with the State government as to the adjustment of the debt. This brings me to a consideration of the evidence contained in the negotiations which resulted in the passage of the Butler Bill, going to show that from the very inception of these negotiations, and, indeed, before their inception, the idea was held out to the people of the State, that her creditors were willing to charge the canal and its lands and revenues with, and discharge the State from some portion of the debt.

The first allusion to such an adjustment to be found in our public records, is contained in the annual message of Governor

Whitcomb, delivered to the General Assembly of the State, December 2, 1845, from which I quote the following extract, premising that the person alluded to in the extract is Mr. Butler. It reads as follows, viz.:

"It was said, in a quarter entitled to respect and confidence, at a meeting held at Terre Haute, in May last, that, if the State were to pay to her bondholders, by a State tax and otherwise, a portion of her public debt, it was thought that they would be prepared to take the profits of the canal for the balance. The gentleman who expressed this opinion is now in attendance as the representative of our foreign bondholders, and has verbally advised me that he will shortly prepare a communication offering a liberal arrangement to be laid before the General Assembly."

From this it will be seen that Mr. Butler, months before he reached Indianapolis, had made the impression on the minds of the people, and of the Governor of the State, that the bondholders would *take the profits of the canal for a part of the debt.*

Under the date of December 10th, 1845, Mr. Butler addressed a lengthy communication, through the Governor, to the General Assembly on the subject of the State's indebtedness, and the wish of the creditors for an early adjustment. This communication was referred to a joint committee of both Houses, of which Mr. Secrest, of the House, was a member, and of which Mr. Lane, of the Senate, was chairman.

Mr. Secrest, in the report submitted by him from the joint committee to the House of Representatives, said, that "the general statements contained in Mr. Butler's above mentioned communication to the Governor, were not sufficiently definite for the committee to rest upon as a basis of any action."

In reply to a resolution of the joint committee, informing Mr. Butler of the organization of the committee and its readiness to receive any written proposition from him, in relation to an arrangement of the State debt, he communicated his first written proposition to the committee, of the date of December 19, 1845. On the 25th of December, the committee informed Mr. Butler, by resolution, of its inability to accede to the proposition so submitted by him.

On the 26th day of December, 1845, Mr. Butler made his second proposition, which was accepted, and incorporated into the Act of January 19th, 1946.

Although Mr. Butler did, in that proposition, use language

upon which the holders of the Canal stocks now place so much stress, to the effect that he did not feel himself at liberty to make any proposals or consent to any arrangement which should embrace less than the eventual payment of the just claims of the bondholders for the entire amount of the principal and interest of the bonds in their possession; yet it is manifest that Mr. Butler, in using this language, considered that a payment of a part of the debt by taxation, and a charging of the residue exclusively on the lands and revenues of the Canal, would embrace the eventual payment of the whole, and that he was willing to take the risk of the Canal's paying its part of the debt. Conclusive evidence of this is found in the second paragraph of the proposition. The first paragraph of the proposition having provided for the payment of the interest of one-half of the debt from the revenues of the State, the second reads as follows, to wit.:

"2. The remaining two and a half per cent. on the principal of the bonds, computing from first January, 1841, shall be chargeable against and paid out of the revenues of the Canal, *and shall not be otherwise chargeable against the State.*"

Mr. Butler adds, in a subsequent sentence: "As such reliance is proposed to be placed on the Wabash and Erie Canal by the bondholders for the payment of one-half of the back and accruing interest, it is proper to say that its completion is deemed essential to the plan of liquidation contemplated," etc.

I now call your attention to the interpretation placed on the adjustment by Mr. Secrist, in the report which he submitted, and in which he urged the adoption of the bill which subsequently passed. The following language is used in the report, viz.:

"This proposition is substantially to *release the general revenues of the State and her public faith* from one-half of the entire funded debt, and make the same a charge against the Erie, Wabash and Ohio Canal in Indiana. In effect, it is the same as taking one-half of the public debt from the shoulders of our tax-payers and placing it upon this canal—a work from which the State has not as yet realized any income whatever, though it is to be hoped that, under judicious management, it may be made to yield a handsome revenue. In addition to this, the bondholders are willing to take the canal and its lands (not absolutely, but in trust,) and finish the work through to the Ohio river, advancing one-third or more of the cost of completion in cash, and using the lands for the balance, so far as practicable, and taking their

recourse for this advance, not against the State, but only against the lands and revenues of the canal, thus advancing money to the canal on the security of the Congress grants of lands without imposing any further debt upon the State, but, on the contrary, in effect leaving our debt less by one-half than it now is."

The provisions of the bill accompanying this report show that Mr. Secrist did not misunderstand or misinterpret it. The bill shows, in divers sections, by affirmative as well as by negative expressions, that the canal was charged exclusively with the payment of one-half the interest of the entire debt, and that the State and her plighted faith were discharged from the same.

By the 32d section of the act of January 19th, 1846, the State reserved the right to also charge exclusively upon the revenues of the canal one-half of the principal of the entire debt. This was to be done by calling in and requiring to be surrendered the stocks which might be issued under the first section of the act, and giving to the holders in lieu of them new certificates for one-half of the principal thereof, to bear interest at and after the rate of five per cent. per annum, the principal and interest to be charged on the revenues of the State; and, also, by giving to each such holder another certificate for the other half of the principal of such stock, to bear a like interest of five per cent., "*and to be paid and redeemed and only paid and redeemed out of said canal lands, and the tolls and revenues of said canal;* and from and after the time that the State shall call in said stock issued under the first section of this act, and shall issue new certificates, as aforesaid, *the State, its faith and revenues shall be only pledged and responsible for the payment of one-half of the principal* and interest at five per centum per annum thereon; and for the other half of said principal and interest the holders of said certificates *shall look solely and exclusively to said canal lands and the tolls and revenues of said canal.*"

The said act of January 19, 1846, was submitted to a committee of European bondholders by Mr. Butler, and that committee at a meeting held in London, May 30th, 1846, formally resolved "to concur in the principles laid down in the act of the Legislature, passed at Indianapolis, on the 19th of January, for the adjustment of the debt of that State (Indiana) by the payment of one moiety of the principal and interest by taxation, and the other moiety by the property and tolls of the canal from the State line adjoining Ohio to Evansville on the Ohio river; *such*

property to be assigned to three trustees, and the State to be freed from responsibility on that portion of the debt and interest so to be secured."

This resolution was communicated to Governor Whitcomb, who, in his Message delivered December 2d, 1846, submitted it to the Legislature, and construed it to mean that the State was to be freed from all responsibility on that portion of the debt and interest, which was to be charged on the canal.

The supplemental act of January 26, 1847, is chiefly the work of the London Committee, and the very first section in the exercise of the option reserved to the State by the thirty-second section of the original act, declares that one-half the principal of the debt shall be charged upon the treasury of the State, and the other half upon the canal lands and tolls and revenues of the canal, as provided in the thirty-second section of the original act, and that upon the surrender of the State bonds then outstanding, two certificates shall issue to each holder, each for one-half of the principal, one chargeable on the treasury of the State, and the other on the canal, its lands and revenues.

The following extract from the message of Governor Whitcomb, delivered to the General Assembly on the 11th day of January, 1848, not only shows the same construction of the arrangement, but in a few brief sentences, explains the difference between the original and supplemental bill. The extract is in these words, viz:

"But while the original bill gave the State the option of afterwards throwing one-half of the *principal* also upon the canal for payment, by the supplementary bill (and consequently by the law as it now stands), that object is at once effected by one-half of the surrendered debt, both principal and interest, resting exclusively upon the canal for payment, the State being released from all further responsibility in relation to it. The great and leading principle, therefore, of the first bill, namely, the satisfying of one-half of the surrendered debt from the canal remains unchanged, nor does the supplementary bill involve the State any further in debt. The main difference between the bills consists in the latter giving to the bondholders, who should finish the canal, a priority in the payment of their claims and expenses of its construction out of the tolls and profits, over those who would not join in its construction."

The character of the bonds surrendered and the stocks received in lieu thereof, prove the same theory. The bonds surrendered

pledged the faith of the State for their payment, and mortgaged the public works to secure the performance of that pledge. The canal stocks received in lieu of one-half of the principal of these bonds so surrendered, contain no promise on the part of the State to pay the amount named in the certificates of stock, no pledge of the faith of the State for that purpose; no lien on any of the public works of the State except the canal, but the whole obligation is expressed in these words: "That the Wabash and Erie Canal, and all tolls, lands and effects appertaining thereto, from the State line to Evansville, are irrevocably pledged in virtue of said acts, etc., to A. B., etc., and his assigns, for the sum of $1,000, etc."

It is a well-established principle of law, independently of statutory enactments, that where a mortgage contains no covenant or promise to pay the mortgage money, and there is no such covenant or promise in any other paper, the mortgagor, although he *may redeem* the mortgaged premises, is not personally bound, and the mortgagee must look exclusively to the mortgaged property for satisfaction.

The last reference I shall make in proof of the first proposition is to an opinion of the Supreme Court of the United States in the case mentioned in a former part of this communication, viz.: The trustees of the Wabash and Erie Canal against Beers. 2d Blackf., 451.

In that case the Court, in incidentally construing this very Butler bill, speaking of the surrender under it by one of the parties to the suit, of certain bonds of the State, uses this language: "The holders of the latter bonds believed that with the $200,000 lien prior to theirs, they *would improve their condition by taking the State for one-half the debt, and the canal stock certificates for the other.*"

The second proposition is, that the State has not, since the adjustment of 1847, by the incorporation of railroad companies, or by any other act of hers, according to any recognized rule of law, or any established principle of equity jurisprudence, created a liability on her part to pay any portion of the debt charged upon the canal. It is a principle of public law which this State has no disposition to gainsay or evade, that a sovereignty which can not be sued is bound in the performance of her contracts to do, and omit everything which individual persons, under similar circumstances, could be compelled by action at law or suit in

equity to do, or to refrain from doing. We insist, however, that the good faith and honor of the State do not demand anything beyond the requirements of this rule; and that Indiana, in the matter complained of, has done nothing which a natural person could have been compelled to omit, and has omitted nothing which such a person could have been compelled by judicial proceedings, under similar circumstances, to do.

The memorial of the holders of the canal stocks, bases their claim exclusively upon the assumption that Indiana has wrongfully and in violation of her covenants contained in the Butler Bill, authorized the construction of a system of railroads, which, coming in competition with the Wabash and Erie Canal, has so impaired its revenues as to destroy its value as a security. That railroads have been built in this State by incorporated companies, organized or assuming to act under State laws passed since the transfer of the canal to the Trustees, can not be denied, and it must be admitted that one of these roads does come in direct competition with the canal, and has largely contributed to the reduction of its revenues. With this admission, however, we insist that there is no stipulation in the Butler Bill or elsewhere, restraining the State from developing her resources by the construction of railroads either by direct State action, or by authorizing their construction by incorporated companies. Covenants or stipulations must be construed in reference to the main scope and body of the instrument in which they are contained, and can not, by wresting them from the context, be made to apply to matters not contemplated by the parties, and which would not have been agreed to if they had been suggested prior to the closing of the compact. The memorialists, to make out a breach of covenant on the part of the State, rely upon the stipulations contained in the fourteenth section of the Supplemental Act of January 27, 1847, but omit the recitals which give significance to the language employed; and to sustain their construction they enlarge the scope of the stipulations therein contained, in a manner that no lawyer would pretend to do in construing a contract between individuals. Covenants in restraint of any lawful business or trade are never implied, and when clearly expressed are considered to be against public policy, and therefore strictly construed against him who seeks to enforce the restraint. Here is an arrangement made between the State and a portion of her creditors, not before the invention of railroads,

but after their practical introduction into this State, whereby, with the assent of the creditors, one-half of the debt of the State is charged on the revenues and Treasury of the State, and the other half exclusively upon the Wabash and Erie Canal, its lands and revenues, without a word being said in the legislation, or in the negotiations which led to it, about the State being restrained in her right to make railroads, or to authorize others to build them within her limits; and yet it is insisted that the covenants made by the State, in relation to the things she did agree to do, or omit, are to be extended by construction or implication, so as to embrace a covenant to abdicate her sovereignty and refrain, forever, or so long as the arrangement should continue, from building, or permitting to be built, any of these great instruments of modern civilization and progress, which might compete with said canal, or impair its revenues.

Suppose Mr. Butler, in his negotiations with the Legislature, had made it a part of one of his propositions that the State should never build, or authorize the building of a railroad within her limits that should, to any extent, great or small, come in competition with the Wabash and Erie Canal, is it not certain that the proposition, so long as it contained such a feature, would have been promptly rejected. The construction contended for is monstrous. Indiana never expressly or by implication, stipulated to stand in the way of her own development, or of the development of the nation, by prohibiting railroads from being built within her borders that might come in competition with the Wabash and Erie Canal.

If, however, for the sake of the argument, we admit the construction contended for by the memorialists, still there is another complete and perfect answer to the claim made by them. It is notorious that since the transfer of the Wabash and Erie Canal to the Trustees, the State has not made a single mile of railroad. It is equally true that no line of railroad has been constructed within the State by any organized company which can, in any just or proper sense, be said to come in competition with said canal, except the Wabash Valley Road. This road does run parallel with and near the canal from Fort Wayne, in Allen County, to Attica, in Fountain County, a distance of about one hundred and thirty miles. If it shall be said that the Evansville and Crawfordsville Railroad, extending from Evansville to Terre Haute, is also a competitor of the canal, the reply is, that the

canal from Terre Haute to Evansville was a failure from the beginning, and never was in a condition to compete with a good wagon road between the two points above named. This reduces the grounds of complaint to the failure of the State to prevent the construction of the Wabash Valley Railroad.

The Constitution of the State was amended in 1851 so as to prohibit the incorporation of railroad or other companies by local r special legislation, but allowing their organization under general laws to be passed for that purpose. By reason of this, the General Assembly, in 1852, passed a general railroad law unde which railroad companies might be organized. If there ever was any legislative authority for the building of the Wabash Valley Railroad, it was derived from this general law, for it is certain that no special charter was ever given for that purpose. It either was or it was not a part of the contract between the State and the holders of the canal stocks that the State should neither build or authorize the building of any railroad that might compete with the canal. If it was not a part of the contract that the State should be thus restrained, then the claim made by this memorial falls to the ground. If the contract did restrain the State as contended for, then the question arises whether the general railroad law of 1852 authorized the building of the Wabash Valley Railroad. It must be admitted that said law is general in its terms, and contains no express restriction on the subject of lines of railroads that might compete with the canal, and yet I insist that the general railroad law could not, and did not, authorize the building of any railroad, the construction of which was interdicted by a valid subsisting contract made by the State. If the State by the arrangement of 1847, contracted that no such improvement as the Valley Railroad should be made, a subsequent authorization by the State of the making of the road would be an attempt to license by State law the impairing of the obligation of a contract, a thing which every State is, by the express terms of the Constitution of the United States, inhibited from doing.

It is not to be *presumed* that the State intended to pass an unconstitutional act, and if the general railroad law is susceptible of two constructions, the one constitutional and the other unconstitutional, the former interpretation must be adopted and the latter rejected. Upon the theory, then, that the State was by her contract restrained from authorizing a railroad to be

built that would compete with the Wabash and Erie Canal, and thereby diminish its revenues, the general railroad law of 1852, although unrestricted in its terms, must be construed to apply only to such lines of road as it was competent for the State to authorize without impairing the obligation of any contract. Upon the assumption that the building of competing roads was prohibited by the contract, and upon the construction of the general railroad law of 1852, just suggested, it follows that the construction of the Wabash Valley Railroad was unauthorized by that act, and was, therefore, an illegal act, which the Trustees of the canal—two of whom are selected by the holders of the canal stocks—or the stockholders themselves could have restrained by injunction. The railroad, of the construction of which complaint is made, was built, not by the State, but by persons acting, or assuming to act, as a corporation under a pretended authority from the State, and these persons were amenable to civil process, and the Federal and State Courts were open to the memorialists, and could have afforded them a complete remedy, by injunction, for what they now say was an irreparable injury, done by authority of the State.

Suppose the Wabash Valley Railroad Company, instead of constructing their road on the line which it now occupies, had located and commenced constructing it on the towing path, or in the bed of the Wabash and Erie Canal, could the Canal Trustees and the holders of the canal stocks have stood by and witnessed such an appropriation of the canal, under the pretense that it was authorized by the State, and then make this tort of the railroad company the basis of a claim against the State?

If the holders of the canal stocks had vested rights in the canal, as they insist in their memorial, then the State did not, and could not, authorize their destruction; and, with the Courts open to them, it is marvelous that they stood by and witnessed this destruction without an effort to prevent it. Such conduct is only consistent with the theory that they themselves believed that the acts now complained of were not a violation of the State's covenants, but what the lawyers term *damnum absque injuria;* that is, a loss without an injury—a loss for which neither the State nor any other person is responsible.

My apology for the length of this presentation is, that the press of New York and London have been used to give currency to the imputation that Indiana, in refusing to charge these canal

stocks upon her treasury, is guilty of repudiation, and it seemed proper that the public should be informed, through some official channel, of the views entertained by our people, together with the grounds upon which they are based.

Before dismissing the subject, I earnestly recommend the passage of a joint resolution proposing an amendment to the Constitution, so as to declare that no act of legislation shall ever take effect, or become a law of this State, whereby said canal stocks, or any part thereof, shall be recognized as a debt of the State, or charged upon the Treasury thereof, by way of redeeming said canal or otherwise, until such act of legislation shall have been submitted to, and ratified by, the qualified electors of this State, at a special election to be held for that purpose, in pursuance of law, a majority of the votes cast at such election to be necessary to effect the ratification.

SINKING FUND.

The report of the Auditor of State shows the condition of the Sinking Fund to be as follows:

Money on hand	$550,916 80
Amount secured to the fund by notes and mortgages	206,941 25
Due from State for stocks redeemed with the fund, for which no bond has been issued to the School Fund by the State	135,366 67
Due from the State for advance to the Southern Prison, to repair the damages done by fire	12,000 00
Due from the State, to complete Supreme Court Room, etc	6,802 30
Total	$912,027 64
From which deduct amount in the fund belonging to owners of mortgaged property sold, the sales being in excess of amounts due	$4,114 10
Net balance of moneys and effects in the hands of the Auditor	$907,912 04

I recommend that the amount due to the fund for State stocks redeemed, be secured by a non-negotiable bond from the State to the School Fund; that the other small sums due from the State, be immediately refunded to the Sinking Fund, by an appropriation for that purpose; and that the moneys on hand,

and the uncollected securities, as fast as realized, be invested in the registered interest bearing bonds of the United States, so that the fund may be made productive, and the income thereof distributed for common school purposes.

The wisdom of making the Auditor, instead of the Treasurer of the State, the treasurer of this particular fund, is not very apparent, and I hope the fund may be transferred to the Treasury, and its prompt investment secured by proper enactments.

WAR CLAIMS AGAINST THE GOVERNMENT.

When the condition of these claims was reported two years ago, the tenth installment thereof, amounting to $125,721.80, had not been passed upon by the Treasury Department. On the 8th day of December, 1869, I received a draft or warrant from the Treasurer of the United States, payable to my order in my official capacity, for $41,412.15, allowed on this installment, which I, on the same day, paid into the State Treasury, and received a quietus for that amount. The items constituting the residue of the installment were either disallowed or suspended for further explanation or proof.

In the latter part of April, 1870, I succeeded in having the papers and proofs prepared necessary for the presentation of an additional claim, designated as the Twelfth Installment, for moneys advanced for the purchase of horses in 1861 for the military service of the United States, and amounting as presented to $35,282.12.

As the papers and forms of proof of this installment had been prepared by Gen. W. H. H. Terrell, during his service as Adjutant General of this State, and as he understood and could explain the items constituting the claim better than any other person, I sent all the papers to him at Washington, and requested him to present and prosecute the claim in the Treasury Department, assuring him that the State would pay him a reasonable compensation for his services. The claim was accordingly presented by Gen. Terrell, and on the 21st day of September, 1870, I received a draft from the Treasury of the United States for $23,255, payable to my order in my official capacity, and immediately paid the same into the State Treasury, and received a quietus for the amount.

The items constituting the residue of this installment were

either disallowed, or suspended for further explanation and proof.

The Eleventh Installment of our war claims was for moneys expended by the State in equipping and subsisting State troops belonging to the Indiana Legion, while in actual service, upon the call of the Governor, during the rebellion. Under the Act of Congress of March 29, 1867, Hon. John Broadhead, Hon. R. Flint, and Col. W. R. Kinney, were appointed Commissioners to ascertain the amount expended by this State in enrolling, equipping, subsisting, transporting and paying such State forces as were called into service in this State after the first day of January, 1862, to act in concert with the United States forces in suppressing the rebellion. Said Commissioners met at Indianapolis in March, 1869, and did not complete their labors till the latter part of September or the beginning of October of the same year, at which time they made a report awarding to the State $481,178.24, for moneys expended for the purposes contemplated by said Act of Congress. Of the amount thus awarded, the Treasury Department allowed the sum of $464,923.24, and in June, 1870, I received from the Treasurer of the United States a draft for that amount, which was immediately applied, through the Board of State Debt Sinking Fund Commissioners, to the redemption of the outstanding foreign indebtedness of the State, as stated in a former part of this communication.

The sums received from the Government since the report contained in the message delivered at the opening of the General Assembly two years ago, amount in the aggregate to $529,690.39, as follows, viz.:

On Tenth Installment	$ 41,412 15
On Eleventh Installment	464,923 24
On Twelfth Installment	23,255 00
Total	$529,690 39

The Eighth Installment, amounting as presented, to $606,979,-41, can not be heard or adjusted by the Treasury Department until there is additional legislation authorizing it. There is a bill pending in the Senate of the United States which, if it shall become the law, will provide for the auditing of the claim. This claim is chiefly for interest paid by the State on her War Loan Bonds, issued for money borrowed to aid in the suppression of the rebellion. I feel assured that in the suspended and disallowed

items of the different installments, there are very considerable sums that are justly due to the State, the allowance of which might be obtained by furnishing such additional proofs and explanations as might be procured or made. It is, however, so difficult to procure an efficient prosecution of such claims without promising a large compensation for the service, that I prefer that the General Assembly should act in the matter, rather than to assume the responsibility myself.

TAXATION OF RAILROADS.

At the last Special Session, I called attention in a message, which will be found at page 122 of the Senate Journal, and at page 174 of the House Journal, to some very glaring defects in the present law for the assessment and taxation of railroads, through which great injustice is done to the State and to the owners of other kinds of property subject to taxation.

I now respectfully call attention to that communication, and renew the recommendations made therein.

TAXATION OF BANK STOCK.

I repeat the recommendation made at the opening of the last General Assembly, that provision be made for taxing the shares of stock in the National and other banks, for municipal purposes, as other property is taxable.

The opinions then expressed as to the power and duty of thus legislating remain unchanged.

ASSESSMENT, EQUALIZATION AND COLLECTION OF TAXES.

The entire taxable property of the State for the year 1868, as it appeared on the duplicates, was $591,979,964.00. Under the operation of the new appraisement of real estate made in 1869, if we treat the proceedings of the State Board of Equalization as binding, the duplicates of 1869 ought to have shown the aggregate amount of the taxable property of the State to be $671,220,945.00, or an increase of $79,240,981.00. If all this increase had been carried on the duplicates, it is safe to say, that even then the figures would not represent one half of the real value of all the property that is taxable under our laws. The law requires property to be valued at its true cash value. This language as applied to the appraisement of real estate for taxa-

tion is construed to mean the sum that the property would command in gold at a forced sale, and by this construction the appraisement is reduced to less than one-half and in many instances to less than one-third of the amount that the owner would be willing to take for the property or than a prudent man desiring to purchase would give for it. There seems also in many cases to be a rivalry, not only between individuals, but between the officers of different counties to depreciate the value of their taxables on the duplicates. County officials take it for granted that the real estate in other counties will be appraised greatly below its true value; and, upon this assumption, justify themselves in making a grossly insufficient appraisement as an act of necessary self-defense to prevent an excessive contribution to the common burthens. Nor does the evil stop here: The man whose taxables consists chiefly of personal property, justifies himself in returning to the assessor one-third part of the value thereof, because he sees that his neighbor's acres and town lots are valued by a similar standard. The practical effect of this is to depreciate the wealth and importance of Indiana in comparison with other States, and the tendency is to keep immigration and capital from the State. Worse than all this, however, is the fact that such practices are inimical to public and private virtue, and give official sanction to fraud and falsehood.

I recommend that in imitation of the assessment laws of Michigan, an amendment shall be passed declaring that the words "cash value," as applied to the appraisement of property for taxation, shall mean the usual selling price at the place where the property is at the time of assessment, not a forced sale, but at private sale. I trust that you will be able to devise some remedy to prevent the demoralizing practice of counties and individuals competing with each other in the valuation of their taxables at rates grossly disproportioned to their real value.

The action of the State Board in equalizing the appraisement of real estate has been disregarded in many if not all of the counties in which a per centum was directed to be added to the appraisement as left by the District Boards; but, when a deduction was directed to be made, the County Auditors, as a general rule, have not been slow to execute the order in making out the duplicates. By this failure to comply with the action of the State Board, and by unauthorized deductions not directed by that Board, the total value of all the taxable property of the

State, as it stands on the duplicates, is reduced more than fifteen millions of dollars below what it would have been if the action of the State Board had been carried out, and no such unauthorized deductions had been made.

At the last special session, the attention of some of the members of each House was called to the fact that, by the change in the boundaries of the Congressional Districts, the law as to the places of the meetings of the District Boards of Equalization in seven of the Congressional Districts had become impossible of execution, as the statute required each District Board to meet within the district, and at a place designated; and this designated place had, by the change in the apportionment, been placed without the district to which it formerly belonged.

A bill passed the Senate to remedy the difficulty, but was not acted upon in the House. The Auditor of State, by advice of the Attorney General, designated the places of meeting of the District Boards in the seven districts in which the law had become impossible of execution. The Auditor of Marion County, in making the duplicate of 1869, having failed to recognize the action of the State Board in directing an increased per centum to be added to the appraised value of the real estate of that county, the Attorney General, on the relation of the Auditor of State, commenced a proceeding in the Marion Civil Circuit Court to compel the Auditor of Marion county to comply with the order of the State Board of Equalization.

The question was presented on its merits, two points being made in resisting the issuing of a mandate, viz.:

1st. That the District Boards met at unauthorized places, and therefore were illegal bodies and could not appoint delegates to the State Board, and that the State Board having been composed of delegates, a majority of whom were thus appointed, it also was an illegal body, and its acts were void.

2d. That the session of the State Board was, by the statute, limited to ten days; that its meetings were continued beyond the time limited, and that the order of equalization was made on the twelfth day after that on which the Board met and organized.

The Circuit Court refused the mandate, and, although the case was prepared for the Supreme Court, by a reservation of the proper exceptions, no appeal has been taken—Attorney General Williamson having, as I am informed, come to the conclusion

that the judgment of the Court below, in refusing the mandate, could not be reversed.

After examining the question with some care, my own opinion is, that the objections made to the District Boards—though purely technical—are yet good technical objections; and that the remedy for the evil is not by appeal, but by curative legislation. The necessity for such legislation is clear; for, if the State Board was an illegal body, so also were the District Boards; and yet, the action of the District Boards has been carried out by some of the County Auditors who repudiate that of the State Board.

I have caused a tabular statement to be carefully compiled from the report of the Auditor of State for the year 1869, arranged by counties in alphabetical order, showing in separate columns what the aggregate value of the real estate and improvements would have been in each county, if the action of the State Board had been carried forward to the duplicates; what it is as actually entered on the duplicates of 1869, with the increase or decrease occasioned by the failure to follow the orders of the Board.

By this statement it will be seen that, in some counties, after deducting the per centum authorized by the State Board, large additional deductions have also been made.

I will cheerfully furnish copies of said tabular statement to the committees to which the subject may be given in charge, it being too extended to make it a part of this communication.

In view of what has been said, I respectfully recommend that the meetings, organization, and proceedings of the District Boards be legalized; that the proceedings of the State Board be thoroughly revised by a joint committee, representing all parts of the State; and, so far as these proceedings may be found to be just and equitable, let them be affirmed; and, so far as they are found to be otherwise, let the appraisements be so altered as to make them conform to a just standard; and when the equalization is completed by the committee, and approved by both Houses, let it be made effectual by the proper enactments.

I further recommend that provision be made that future appraisements of real estate for taxation, shall not become effectual until they are submitted to, and revised and affirmed by the General Assembly, at the first regular meeting thereof, after the making of such appraisements; and providing, also, that if any County Auditor shall fail to conform to such appraisement

after it has thus been affirmed, he may be proceeded against by action on his bond, or by a proceeding for a mandate in the Courts of Marion county. Whenever the interests of the State are injuriously effected by the official negligence, or official misconduct of a county officer, such county officer should, in my judgment, be liable to an action in some Court at the Capitol of the State. The existence of such liability would prevent the delinquencies that are now so common.

Something should also be done to prevent the return of such large delinquent lists. Our delinquent list compares very unfavorably with those of other States; partly, because men are returned as delinquent, from whom the taxes could be made, if the proper time was allowed, and the proper effort made to collect; and, partly, because delinquencies are carried on the duplicates long after the possibility of their collection has ceased.

Provision of some kind should be made for purging the duplicates of this worse than useless matter, the placing of which on the tax rolls, adds considerably to the county expenses, and gives a more unfavorable opinion of the willingness and ability of our people to pay their taxes, than the truth would justify.

EDUCATION.

The report of the Superintendent of Public Instruction affords gratifying evidence of the progress of popular education throughout the State. The common shools are continually growing in public favor, and were never so efficient as they now are in training our children for the high duties of American citizenship. I am sure they will continue to deserve and receive the fostering care of the General Assembly.

As the State school tax, as well as the income of the Common School Fund, is distributed among the several counties, according to the number of children in each, it is highly important that the enumeration upon which this distribution is based, should be free from the least suspicion of unfairness or inaccuracy. To this end the law should be so amended as to require not only the names of parents, guardians, and heads of families, to appear in the list, as is now the case, but the names of the children belonging to each family, (which is not now required,) should also be given; and after the County Examiner has reported the enumeration to the Superintendent of Public Instruction, the original enumeration papers should be required

to be filed in the office of the County Auditor, to be preserved, and to be open to public inspection. Authority should also be given to the Superintendent of Public Instruction to cause the enumerations to be revised, and, if found to be inaccurate, corrected before making the distribution; and, also, to equalize, in making subsequent distributions, within a reasonable time, to be prescribed by statute, any inequitable distributions which may have been made on an incorrect enumeration. Severe penalties should also be provided for official malfeasance in making the enumerations.

My attention has been called to the fact that some Township Trustees, instead of keeping the school moneys in their hands separate from the township funds, confuse the moneys and accounts, whereby school funds are applied to roads and other township purposes, to the temporary injury or permanent loss of the schools.

Such practices should be prohibited under proper penalties by plain statutory enactments, to be published as a part of the school law, and placed in the hands of every Township Trustee.

STATE UNIVERSITY.

The State University has greatly enlarged the sphere of its usefulness in consequence of the liberality of the last General Assembly, as well as the one preceding it. I commend the institution to a continuance of the favorable consideration of the General Assembly.

AGRICULTURAL COLLEGE.

In pursuance of the Act of May 6th, 1869, the College contemplated by the Act of Congress of July 2d, 1862, was in 1869 located in Tippecanoe county, on a tract of land containing one hundred acres, donated for that purpose, and situated on the west side of the Wabash river, about one mile and a half from the city of Lafayette. Mr. Purdue gave his bond to the State for the payment of the donation of $150,000 offered by him, the same being payable in annual installments, in pursuance of his original proposition. The Board of Trustees of the institution, in accordance with the provision of said Act of May 6th, 1869, have assumed as their corporate style the name of "The Trustees of Purdue University." For the condition of the funds of the

institution and other information pertaining thereto, I respectfully refer you to the report of the Secretary and Treasurer of the institution, herewith submitted.

By the Act of May 5th, 1865, the Governor is made a member and President of the Board of Trustees. The land scrip having been disposed of, and the money safely invested and the College being located, no sufficient reason, in my judgment, now exists for the continuance of the Governor as a member of the Board. I therefore recommend the passage of an amendment providing for the appointment of an additional trustee, and relieving the Governor from serving as a member of the Board.

NORMAL SCHOOL.

I have received no report from the officers of the State Normal School, and therefore have no definite information concerning its progress, condition or wants. I believe it is doing a good work, and is a necessary and important part of our common school system. To extend its benefits to those who ought to enjoy them, it would seem to be necessary that some plan should be devised whereby the cost of living to those who attend its sessions from other parts of the State should be diminished.

BENEVOLENT INSTITUTIONS.

INSTITUTE FOR THE BLIND.

The Indiana Institute for the Education of the Blind, is, in the language of the report of its trustees, "enjoying a high degree of prosperity, and doing its work well and to the credit of the State." To enable the Institution, however, to do all the work which ought to be done, it must be enlarged. There was a pressing necessity for such enlargement two years ago, but the officers of the Institution, in consequence of the appropriations required by the Hospital for the Insane and the Institution for the Deaf and Dumb, deferred urging an appropriation for that purpose until now. For the extension of the Institute building, and for other improvements mentioned in the report of the Superintendent, it is estimated that the sum of $65,000 will be required. I earnestly recommend that the sum above named may be appropriated for the extension and improvements required.

HOSPITAL FOR THE INSANE.

I cordially commend to your attentive consideration, the able and instructive report of the Superintendent of the Hospital for the Insane. The capacity of the Institution has been largely increased, so that there is now room for 520 inmates. It is susceptible of a comparatively small additional increase of capacity by enlarging the south wing. Apart from the fact it may be safely estimated that not more than one-third of the insane of the State who ought to receive the care and treatment of such an institution are now provided for, it would seem that the Institution should be thus enlarged to equalize its capacity for the reception of patients of both sexes, the number of applicants for admission of each being about equal. If the south wing shall be thus enlarged, the capacity of the Hospital will then have reached a limit beyond which it would not be wise to extend it, but instead thereof, provision should be made for the erection of another Institution at some other point in the State.

It may be a question whether this should be attempted before making some provision for the care of the idiotic, and for the education of idiotic children. My impression, however, is that the sufferings of the insane still unprovided for are more severe, and that their condition more urgently demands speedy relief than the other unfortunate class to whom allusion is above made. I invite your consideration to the necessities of both these classes of unfortunates, in the hope that you will provide such relief, at the earliest practical period, as the claims of humanity demand and the ability of the State will justify.

It will be perceived by the report of the Trustees and Superintendent of the Hospital that the appropriations made at the last session of the General Assembly are insufficient to defray the current expenses of the Institution to the 31st day of March, 1871, which is the end of the fiscal year of the Hospital. I recommend that this deficit be immediately supplied by an appropriation so that the officers of the Institution may not labor under the disadvantage of having to make their purchases on credit until the passage of the General Appropriation Bill, at or near the close of the session.

I also ask that the amount necessary to pay for the water works furnished for the Institution, and now in successful operation, may be appropriated without delay.

I invite your favorable consideration to what is said by the Trustees and Superintendent in their reports as to the necessity of more liberal estimates for subsistence in making appropriations for the current expenses of the Institution.

DEAF AND DUMB.

The Institution for the education of the deaf and dumb not only successfully continues to perform the beneficent work for which it was established, but, through the liberality of the last General Assembly in providing for its enlargement, the sphere of its usefulness has been greatly increased and extended. The contemplated extension of the building having been completed, the capacity of the Institution is now believed to be sufficient for the accommodation of those entitled to its benefits for years to come. After the new building was completed and ready for being fitted up and furnished, the sum of $10,924 was drawn from the Treasury of the State on the application of the Trustees and Superintendent, and applied to fitting and furnishing the enlargement under an express authority given for that purpose in the organic law of the Institution. By reason of the enlargement, the present school year commenced and continues with a larger number of pupils than was estimated for when the appropriation for current expenses was made two years ago, and consequently there will be a deficit of $7,000, which sum I hope will be appropriated without delay, so that the current expenses of the Institution to the end of its fiscal year, March 31, 1871, may be provided for, and the necessity and disadvantage of making purchases on credit may be avoided.

SOLDIERS' HOME.

I commend the Soldiers' and Seamen's Home at Knightstown, and especially the Orphans' Department thereof, to your especial consideration, with an expression of the hope that it may receive a more liberal support at your hands than has hitherto been accorded. Thus far it seems to have been reluctantly admitted into the family of our benevolent institutions, and it has appeared to be more difficult to get appropriations for its support than for any kindred institution. For my own part, I know of no class of the meritorious unfortunates who are entitled to a fuller measure of the sympathy and care of a benevolent and patriotic people than the scarred veterans' and soldiers' orphans

now in the "Home" at Knightstown. The amount heretofore allowed for the current expenses of the Institution has been insufficient, and this year again the Commissioners have been compelled to borrow $5,000 to enable them to meet the necessary current expenses. I believe that the affairs of the Institution have been managed with marked judgment and economy, and trust that the provision for its support may be as liberal in proportion to its necessities as that made for any of the other benevolent institutions of the State.

THE STATE BOARD OF AGRICULTURE AND STATE GEOLOGIST.

It may well be doubted whether any act of legislation has been adopted by this State for many years which will prove so potent in developing the latent resources of the State, and in directing attention to our mineral wealth and manufacturing advantages as that of March 7, 1869, providing for the establishment of a Department of Geology and Natural Science in connection with the State Board of Agriculture. On the 22d day of March, 1869, I appointed Professor Edward T. Cox to the office of State Geologist, created by that act, and soon after he established himself at Indianapolis and entered upon the duties of his office. The act required him to make a survey, from time to time, of a portion of the State, in order to be able to complete a thorough geological survey of the State, as soon as consistent with his other duties, as defined by the act. With the small appropriation made, and the little assistance he was able to employ, it was impracticable for the Geologist to extend his labors over a very large scope of country, unless he disregarded that thoroughness which is essential to the attainment of valuable results. He selected, as the chief field of his operations, that portion of the State which previous partial surveys had designated as the region whose development would be of the greatest immediate practical value to the entire State, in attracting both labor and capital to and within our borders. I have received letters from highly respectable gentlemen of different counties of the Northern as well as the Southern portions of the State, complaining of the neglect which their respective localities had suffered at the hands of the State Geologist, but I am satisfied that the course he pursued was the wisest and best, considering the means at is command and the circumstances by which he was surrounded.

I recommend that a reasonable addition be made to the salary of the Geologist, and that increased means be placed at the disposal of the State Board of Agriculture for the support of its Geological and Scientific Department, so that assistant geologists may, at the earliest practical period, be put in the field to hasten the completion of a survey of the entire State, and to avoid any suspicion that mere local interests are sought to be promoted. The developments already made, demonstrate that in the block coal of this State our people possess a mine of wealth that is practically inexhaustible. Covering a strip of territory averaging three miles in width, it exists in workable veins from the Ohio river to Warren county, a distance of one hundred and fifty miles. The fact that this coal can be taken directly from the mine to the furnace and used for smelting purposes without coking, producing as good, if not better, iron than that made from the same ore with charcoal, gives Indiana advantages for manufacturing purposes that can hardly be exaggerated.

If practical experience shall affirm, as I believe it will, the correctness of the opinion so confidently entertained by Professor Cox, that the iron made at the furnaces in Clay county will make as good Bessemer steel as the imported iron now almost exclusively used for that purpose, our facilities for the production of steel rails must be of incalculable value.

COURTS.

I respectfully refer you to the message delivered two years ago for my views in relation to our judiciary, and wish to be understood as repeating the recommendations then made. Since then the Supreme Court has decided that the Criminal Courts established in some of the more populous counties are not Circuit Courts, but that they have a legal existence as inferior Courts. This being so, their names should be changed, and the harmony of our Circuit Court system should be restored by the proper amendatory enactments.

I fully concur in the opinion so generally expressed by the judges and lawyers, that provision should be made for the addition of a fifth judge to the bench of the Supreme Court.

I herewith respectfully submit a copy of the memorial adopted at a meeting of the bench and bar, held at Indianapolis on the 30th day of November last, on this subject, the same having

been presented to me by the committee having the matter in charge, with the request that I would lay the same before you.

The statute passed at the last session requiring the salaries of the judges and prosecuting attorneys of the criminal courts to be paid out of the county treasuries, is wrong in principle and ought to be repealed. If these courts are not necessary to the effectual and prompt prosecution of the pleas of the State, they ought to be abolished; if they are necessary, the salaries of the judges and prosecutors ought to be paid out of the common treasury.

DECEDENTS' ESTATES.

Some additional legislation is, in my judgment, necessary in relation to decedents' estates, for the attainment of the following object, viz.:

1st. To prevent small estates from being absorbed by the costs and expenses of administration, by providing for their settlement through the instrumentality of a public administrator, without charge to the estate, or by dispensing with administration altogether.

2d. To enlarge the amount allowed to widows out of the estates of their deceased husbands free from the claims of creditors.

3d. To make a similar exemption in favor of the decedents' infant children of tender years left unprovided for by his or her death.

I also believe that provision might with propriety be made to dispense with administration in all cases where those interested in the estate shall give undoubted security for the payment of the debts thereof within a resonable time, to be prescribed by statute.

I make these suggestions without going into detail, feeling assured that if the objects named shall meet your approval, there will be no difficulty in giving the recommendations practical effect.

CRIMINAL LAW AND PRACTICE.

I also refer to the views expressed two years ago on the subject of the amendment of our Criminal Code, and the reformation of the practice in criminal prosecutions. The views then expressed

on these subjects are still entertained. I especially suggest that the brutal crime of prize fighting has not yet been denounced as a felony by our law.

COUNTY REFORM.

There is an unmistakeable popular demand for reform in the administration of county affairs, and for the reduction of the fees of county officers, especially in the wealthy and more populous counties. Under the constitutional provision preventing local or special legislation on the subject of fees and salaries, it is generally understood that compensation for official services can not be graduated according to population. This may render it difficult to devise a fee bill that will, in all cases, be just both to the public and to the office-holder. But this difficulty need not, and should not, prevent an effort being made, and successfully made to accomplish the result.

A NEW STATE HOUSE.

I recommend that provision be made for the immediate acquisition of all the property not now owned by the State, situated between Tennessee and Mississippi streets and between Market and Ohio streets, and for vacating Market street, so far as it forms the northern boundary of the State House Square, and for vacating the alley which bounds the arsenal lot on the north, to the end that the property now owned by the State, and that so proposed to be acquired, may be used as a site for a new State House whenever it shall be deemed expedient to build one. The building of a new State Capitol can not long be deferred, and now is the proper time to secure the proper site without a large outlay for that purpose. The site proposed would embrace about nine acres.

REFORMATORIES.

The reports of the House of Refuge and Reformatory for Women and Girls not having been received until after the preparation of this communication, I shall ask permission to present to you hereafter, in a special message, whatever I may deem it necessary to say concerning those institutions.

OUR DIVORCE LAWS.

The laws of this State regulating the granting of divorces, and especially the lax manner in which they have been administered

in some of our courts, has given Indiana a notoriety that is by no means enviable. Some of the reproach that has been cast upon the State in this connection is doubtless undeserved; but a candid review of our laws and their practical operation on this important subject will, it is believed, satisfy any impartial mind that a reformation is imperatively demanded.

The causes for which divorces may be granted under the existing statutes are as follows, viz.:

First. Adultery.

Second. Impotency.

Third. Abandonment for one year.

Fourth. Cruel treatment of one party by the other.

Fifth. Habitual drunkenness of either party.

Sixth. The conviction, subsequent to the marriage, in any country, of either party, of an infamous crime.

Seventh. Any other cause for which the court shall deem it proper that a divorce should be granted.

It is not my purpose to urge any objection to either of the six specific causes of divorce above enumerated, except to say that the phrase "cruel treatment," which constitutes the fourth cause, has been so liberally construed in favor of applicants for divorces by some of our courts, as to render necessary, in my judgment, a return to the more positive language of the statute of 1843, which required the treatment to be "cruel and inhuman." The great objection to our statute is, however, the discretionary clause already quoted, allowing a court to grant a divorce for any cause that the judge may deem sufficient.

This clause, which pretends to lay down a rule for the government of human affairs in the most important relation of life, is at war with the fundamental idea and elementary definition of law. Law is a prescribed rule of civil conduct. This statute prescribes no rule, the observance of which shall save, or the violation of which shall forfeit conjugal rights. Under this clause the question, what is or is not a sufficient cause for a divorce, instead of being determined by a general rule is measured by no rule at all, and the standard of judgment, instead of being prescribed so that it may be known and read of all men, remains locked up in the mind of the judge until he pronounces judgment between the parties in the case before him. It is worse than delegating legislative powers to the judiciary--which the constitution expressly prohibits—for it authorizes the judge to

make his own judgment of what the law ought to be, the rule of decision in each case, as it arises, without any previous intimation of the standard or rule by which the rights of the parties are to be measured. The constitution prohibits special legislation on the subject of granting divorces, but under this discretionary clause, causes of divorce vary in the several judicial circuits and districts, with the diversified mental and moral peculiarities of the judges. Objectionable as the statute is which regulates the causes for which divorces may be granted, the law governing the practice in divorce cases is worse.

The facility with which citizens of other States, after a pretended residence in this, can and do procure divorces in our courts, and then return to their homes from which they fled for that very purpose, is a reproach to the civilization of the age, and a breach of that comity which should be scrupulously observed between sister States of the same great republican family. Under the present statute a divorce may be obtained in this State where both the plaintiff and the defendant, at the time of the rendition of the decree, are resident citizens of another State. True, the applicant must have been a resident of the county in which he commences suit at the date of the filing of his petition, and he must have been a resident of the State for one year prior to that time, but the year having elapsed, and the petition being filed, his residence may then cease, he may return to the State from which he came, and his application for a divorce will be none the less successful by reason of his departure. Such a statute must be highly appreciated by divorce seekers from other States, who can not afford to keep up the appearance of a residence in this for more than one year, but it is not calculated to give citizens of Indiana a very exalted idea of the righteousness or wisdom of the legislation of their own State. Even permanent residents of our own State, who apply for divorces, are favored by our practice above plaintiffs in other actions. The defendant in every other action purely personal, if a resident of the State, must be sued in the county of his residence, but in divorce cases, the applicant has the right to sue in the county in which he resides, and he can change his residence to attain success abroad, when failure would be certain at home.

I therefore recommend that the clause of the statute which authorizes divorces for any cause that the court may deem sufficient, be repealed, and that the clause making cruel treatment a

good cause of divorce be so amended as to require the treatment to be cruel and inhuman, or cruel and barbarous. I further recommend that the practice in divorce cases be so amended as to embrace the following provisions, viz.;

1st. Requiring the defendant, when a resident of the State, to be sued in the county of his or her residence.

2d. Requiring the plaintiff not only to have been a resident of the State for one year prior to the filing of his petition, but that he should continue to reside in the State during the pendency of the suit and until the case is tried.

3d. Vesting in the Circuit Courts exclusive jurisdiction of applications for divorce.

4th. Requiring the petition in every divorce case to show where the causes of divorce relied on happened or accrued, and where the applicant resided at the time, and if they happened or accrued elsewhere than in this State, and at a time when the plaintiff was not a resident of this State, that no divorce shall be granted unless it be alleged in the petition and proved on the trial that the matters so relied upon would be a good cause of divorce by the laws of the State, place or jurisdiction within which the same happened or accrued.

5th. Requiring the allegations as to the place where the cause or causes of divorce relied upon accrued, and the place of residence of the plaintiff at the time of their accruing, to be verified by affidavit appended to the petition, and also to be proved on the trial.

With such amendments as these we might well hope that Indiana divorces would soon cease to be advertised in any of the Atlantic cities as marketable commodities, and that refugees and fugitives from the justice of other States would no longer come to Indiana in quest of divorces, to be used on their return to their homes as licenses to violate the laws of our sister States.

STATE PRISONS.

So far as I am informed, the State Prisons are well managed and in a satisfactory condition. The financial success of the present administration of the Northern Prison in making it self-sustaining, without disregarding or neglecting the physical, moral or intellectual interests of the prisoners, is worthy of the highest commendation.

The moral reformation that has been wrought in the affairs of

the State Prison, south, since the commencement of the administration of the present Warden, has merited all the praise that has been so generously bestowed upon it.

It is deeply to be regretted that under our system of officering these institutions, the administration of their affairs is so liable to be changed with the mutations of political parties. Wisdom would dictate that considerable permanency of administration, coupled with a rigid responsibility on the part of those having the management of such institutions, should prevail; our policy is just the reverse of this. It is frequent change of administration, with no liability to have the affairs of the prisons inspected or the officers therof called to an account, except during the sixty-one days, in every period of two years, when the General Assembly is in session.

I call your attention to the fact that there are insane prisoners in one, or perhaps both, of our prisons, and some of these are dangerous to the other prisoners, for the want of proper facilities for their care and treatment. Experience has shown, in Ohio and other States, that it is unwise to transfer such prisoners to the Insane Hospital, as placing those convicted of crime among the other insane patients has a bad influence on the latter, and the treatment which the insane prisoners receive from the other inmates of the Hospital, is not such as to promote their recovery. In addition to this, the Hospital is not sufficiently strong for such patients without preparing a ward expressly for their accommodation. I therefore recommend that a ward be constructed within the walls of the Northern Prison expressly for insane prisoners, and that provision be made for the transfer, from time to time, as occasion may require, of all insane prisoners in either of the prisons to such ward.

I invite your attention to the statements in the reports of the Directors and Warden of the Southern Prison in relation to the fire that occurred in April last and the money advanced to repair the damage done to the prison by the fire. The amount advanced was $12,000, and it was furnished by the Auditor of State out of the uninvested money of the Sinking fund in his hands. There is consequently no liability for interest, unless you see proper to provide for the payment of interest to the School Fund for the use of the money.

I have already, in speaking of the Sinking Fund, recommended

that an appropriation be made without delay, to reimburse that fund to the amount thus borrowed.

I desire here to suggest that there ought to be a definite policy established by law as to the insurance of the buildings belonging to the various State institutions. There should be a uniform practice in this respect to insure all State buildings connected with the benevolent institutions, prisons and reformatories, or to insure none of them. As it now is, there is a partial insurance on some and none at all on others. The true policy, in my judgment, would be for the State to be the insurer of its own buildings without exception; that this policy would be profitable in the long run I have no doubt; but with it should be coupled the power, in the event of a loss by fire, to the executive officers of the State to draw from the treasury of the State, under proper restrictions and limitations to be prescribed by law, a sufficient sum of money to repair the injury done. As the matter now stands, the General Assembly must in such case be convened in special session, at an expense to the State, greater, as a general rule, than the sum necessary to be appropriated, or the Governor or some other officer must take the responsibility of obtaining and applying the necessary amount without authority of law.

I commend to your careful consideration the propriety of pondering the question, whether it will not soon be necessary to abandon the Southern Prison, and establish in lieu thereof, at some central point in the State, a prison intermediate between the House of Refuge and the Penitentiary, with a view to the gradation of our reformatory and penal institutions, as well as to a classification of prisoners. The prison at Michigan City might be made to accommodate all the prisoners that would for some years be sent to a prison of that class if we had an intermediate prison. Its location in one of the extremes of the State is an objection to the policy of having but one prison of its class for the entire State, but I do not think this objection is insuperable. The prison at Jeffersonville is in such a condition that it will require a large amount to keep it in even tolerable repair, and then it seems cruel to perpetuate the policy of keeping human beings, though they be convicted criminals, in cells seven feet long, seven feet high, and three and a half feet wide, with no ventilating flues, and no possibility of getting fresh air except through the grating of the cell doors. If the contract system is to be continued, and I do not see how to do otherwise at present, the

law itself should contain such provisions as will give the directors and warden full control, and enable them to terminate the contracts whenever the interests of the State may require it. As the matter now is, the rights of the State depend very much on the skill, or want of skill, with which the contracts for the labor of the prisoners are drawn.

SUPERVISORY BOARD.

I earnestly recommend that a Supervisory Board, to have jurisdiction over all the State institutions, benevolent, penal and reformatory, be established. Its powers of visitation and inspection ought to be ample, and it should also possess the power to suspend or remove officers connected with the institutions under its care; or the last named power might be given to the Executive, to be exercised only upon the recommendation of such Board. As women and girls are inmates of our benevolent institutions, and will be in the new Reformatory, I deem it highly important that the members of such board of supervision should be composed, in part, of women.

PARDONS AND REMISSIONS.

I herewith respectfully submit, pursuant to the requirements of the constitution, a report showing all the reprieves, commutations and pardons granted, and another showing all the fines and forfeitures remitted since the previous report made to the last General Assembly.

CONCLUSION.

In conclusion, I desire to add my hearty amen to the invocation of the Divine blessing upon your labors with which this joint convention was opened, and to assure you of my cordial co-operation in all your efforts to elevate and improve the condition of the people, and to diversify the industries and develop the resources of the State.

CONRAD BAKER.

OFFICIAL.

STATE OF INDIANA, EXECUTIVE DEPARTMENT,
INDIANAPOLIS, December 20, 1870.

Messrs. HENDRICKS, HORD & HENDRICKS,

Attorneys at Law, Indianapolis, Indiana:

GENTLEMEN:—In August last, I employed your firm, on behalf of the State, to advise and assist me in properly protecting the interests of the State connected with, and dependent upon, a suit brought in the Carroll Circuit Court, by John W. Garrett, of Baltimore, Maryland, against the Board of Trustees of the Wabash and Erie Canal.

O. B. Hord, Esq., of your firm, at my request, accompanied me to Delphi, at the August term, 1870, of said Court, and such proceedings were had in the cause, that a continuance resulted to the February term, 1871; this being one of the results I sought to obtain, so that the Legislature would be in session before any judgment could possibly be rendered against the Canal Trustees.

In pursuance of this original employment, as well for my own guidance, as for the information of the General Assembly, to whose consideration the entire subject will be referred, I now desire your personal opinion on the following points, viz.:

First.—Are the forty-one old Internal Improvement Bonds, issued under the General Internal Improvement Act, of January 27, 1836, held by John W. Garrett, and mentioned in his complaint, as well as other similar bonds still outstanding, a lien on the Wabash and Erie Canal, or on any part thereof?

If such bonds are a lien on a part of said canal, but not on the whole, please state the part embraced by the lien.

Second.—Are the same bonds a lien on any other, and, if on any other, on what other of the canals, railroads, and turnpike roads, formerly owned by the State of Indiana?

Third.—If said bonds are a lien on the Wabash and Erie Canal, or on a part of it, and on other public works formerly owned by the State, please state in your written opinion, the order in which the principles of equity jurisprudence would require these several public works, including the Wabash and Erie Canal, or a part of it, to be subjected to the payment of such lien?

Fourth.—If the lien supposed in the last question does exist, can it be enforced in the State, or Federal Courts, against the Wabash and Erie Canal, or a part of it, in the hands of the Canal Trustees, and against the other public works embraced by the lien in the hands of the alienees, or those claiming under them, of the State, according to the principles, and in the order, which govern such questions in Courts of Equity?

Fifth.—If the lien can be thus enforced, can the State, with propriety, or safety, or in good faith, to the owners of the stocks charged upon the canal under the legislation of 1846 and 1847, commonly called the "Butler Bill," or in good faith to her grantees, or to those claiming under such grantees, of the other works embraced by the lien, permit it to be done, if she has the ability to prevent such a result by taking up the bonds which constitute the lien, the sum total of such bonds, exclusive of interest and exchange, not exceeding $191,000.00?

Sixth.—Supposing that such lien can be, and shall be, enforced by judicial action, what effect would the permitting of the enforcement, on the part of the State, have in creating a just ground for asking relief from the Legislature by the holders of said stocks, charged upon the canal under the Butler Bill, and by the owners of the other works embraced by the lien?

In furnishing me your opinion in response hereto, please state whether the members of your firm unanimously concur therein, and if not, who dissents, and the extent, nature, and grounds, of such dissent.

Respectfully yours,

CONRAD BAKER,

Governor of Indiana.

OPINION.

INDIANAPOLIS, December 27, 1870.

Conrad Baker, Governor of Indiana:

SIR: Your letter of the 20th inst., was received on the day upon which it was written.

Feeling impressed with the importance of the questions submited to us for a professional opinion, we have considered them with special care.

In response to them, respectively, we submit the following as our views upon the questions of law.

First—The Act of the Legislature referred to by you, approved January 27, 1836, providing for a general system of internal improvements, contemplated the following works:

1. The White Water Canal.

2. The Central Canal.

3. An extension of the Wabash and Erie Canal, southwestwardly, from the mouth of the Tippecanoe river.

4. A railroad from Madison to Lafayette.

5. A turnpike from New Albany to Vincennes.

6. A railroad or macadamized road from Jeffersonville to Crawfordsville.

7. The removal of obstructions to the navigation of the Wabash River.

8. A canal or railroad from Fort Wayne to Michigan City.

This system of improvements is prescribed by Section 4, of the Act. (Rev. Stats., 1838, p. 337 and following.) This fourth section

makes appropriations for these several improvements, amounting in the aggregate to ten millions of dollars. The seventh section sets apart an Internal Improvement Fund. The eighth section authorizes a loan not exceeding ten millions of dollars, and prescribes the manner in which it may be borrowed. The ninth section is as follows: "For the punctual payment of the interest, and final redemption of the principal of all sums of money which may be borrowed under the provisions of this Act, there shall be and are hereby irrevocably pledged and appropriated, the canals, rail and turnpike roads, with the portions of ground thereto appertaining and privileges thereby created, and the rents and profits of the water power thereof, together with the net proceeds of tolls collected thereon; the sufficiency of which for the purposes aforesaid, the State of Indiana doth hereby irrevocably guarantee."

That it is competent for the Legislature to create such lien by statute can not be doubted. It is not an open question. The section quoted unquestionably created a lien on all the public works, except perhaps the improvement of the Wabash River, provided for in Section 4, that might be brought into existence and completed, or partially completed, by the State.

Large expenditures were made, and substantial progress accomplished towards the completion of each of the first five public works provided for in section 4, and for all loans made pursuant to section 8 a lien attached; and that lien still exists, if the debts still exist.

As to all bonds held by Mr. Garrett, that were issued under the eighth section of the law of 1836, and as to all other outstanding bonds issued under that law, we have no doubt but that they are a lien on all the public works specified as above as subject to the ten million loan authorized by the seventh section of the act of 1836, the western division of the Wabash and Erie Canal being one of those works.

We do not, however, think that that lien extends to the Eastern Division of the canal; that is, to the portion of it lying above the mouth of the Tippecanoe river. The eastern division did not form a part of the system of Internal Improvements provided for by the act of 1836. It had already been in progress as a distinct measure for several years.

An act of Congress of March 7, 1827, had granted lands to aid in its construction. The Legislature of the State by act, approved January 25, 1828, had accepted the grant, and made provision for

prosecuting the work. By numerous other acts subsequent to that time and prior to 1836, it had made provision by authorizing loans of money, and otherwise for constructing that canal.

The tenth section of the act of 1836 authorizes an additional loan of $500,000 to be applied in the construction and completion of this Eastern Division, which before that time had been known as the Wabash and Erie Canal. For the payment of this loan that canal, (the Eastern Division) its tolls, &c., and the proceeds of its lands, were specifically pledged.

Section 11 provides that distinct accounts of disbursements that had been or that might be made on that Eastern Division, should be kept. By an amendatory act, approved February 6, 1837, (R. S. 1838, p. 351,) a distinct designation is given to that portion of the canal lying west of the mouth of the Tippecanoe river. It is enacted that it be designated as the "Wabash Canal." We think it manifest that it was not the intention of the Legislature that the lien declared by the 9th section of the act of 1836 should extend to the Eastern Division, and are therefore of the opinion that those of Mr. Garrett's bonds issued under the 8th section of the act of 1836, and all other like bonds outstanding are not liens upon that portion of the Wabash and Erie Canal lying east of the mouth of the Tippecanoe river.

But there are other bonds outstanding and comprehended within the $191,000 to which you refer, that in our opinion do constitute a lien on the Eastern Division of the canal. Sixty-nine of those one hundred and ninety-one bonds are, as we understand, Wabash and Erie Canal bonds, and form part of the several loans made for the construction of that canal.

An Act, approved January 9, 1832, authorized a loan of $200,000. (Laws 1832, p. 2.)

An Act, approved January 1, 1834, authorized a loan of $400,000. (Laws 1834, p. 49.)

An Act, approved February 6, 1835, authorized a loan of $227-000. (Laws 1835, p. 25.)

The tenth section of the General Internal Improvement Act of 1836, authorizes a further loan of $500,000, as we have already mentioned. For the loan of $227,000 authorized by the Act of 1835, the faith of the State only was pledged. But for each of the other three loans, the canal itself, (the Eastern Division), its lands,

revenues, etc., we specifically pledged. We are not advised as to which of these several loans the sixty-nine outstanding Wabash and Erie bonds appertain. But if issued under either of the Acts mentioned except that one authorizing a loan of $227,000, as it is probable they were, they are a lien on the Eastern Division of the canal.

Second.—As to your second question, we have in effect answered it incidentally in our response to the first question.

In our view, all the outstanding bonds issued under authority of the eighth section, of the Act of 1836, are liens on all the public works composing the "system," provided for in that Act, and upon which the State while it remained the owner, invested money and created values. This lien extends to and attaches upon the first five of the public works enumerated above. And as to the outstanding Wabash and Erie Canal bonds, we are of opinion that all of them except such as may have been issued under the Act of 1835, are specific liens upon all that portion of the canal lying east of the mouth of the Tippecanoe River.

Third.—In reply to your third question, we would say that, so far as concerns the holders of bonds issued under the general Internal Improvement Act of 1836, all the five roads and canals first enumerated above are directly subject to the lien; but, as the State has long since transferred all these works to different persons or companies, those persons or companies have, as *between themselves*, certain equitable rights that the courts would notice and enforce in subjecting the different roads and canals to sale. The equitable rights to which we refer relate to the order in which the several canals and roads should be subjected to sale to satisfy the common lien. The idea or equitable theory governing the order in which property is sold in such cases is this: If the owner of property subject to a lien sells a portion of it, the purchaser has manifestly an equitable right to require that the remainder of the property be first subjected before the portion purchased by him is resorted to. If, after a portion has been thus sold, another portion should be sold to another person, that second purchaser takes his portion subject to the same liability to which it was subject while in the hands of the party from whom he bought; but he, in turn, has the same equitable right to require that the remaining portion still unsold shall be subjected before the portion bought by him is sold, and so on. It results from this, as an equitable rule, that where property subject to a common lien has been sold out or mortgaged in parcels to different persons, at different

times, though all the parcels are bound by the lien, they must be subjected to sale to satisfy the lien, in the inverse order in which they had been conveyed. The last parcel should be sold first; the next to the last should be next sold, and so on backwards to the first purchaser. This equitable right as between vendees of portions of mortgaged premises is fully settled in our Supreme Court:

Day v. Patterson, 18 Ind., 116;
Aiken v. Bruer, 21 Ind., 137;
Alsop v. Hutchins, 25 Ind., 347.

This equitable rule is manifestly as applicable between vendees of the State as it is between vendees of a citizen; and it is the rule that would govern in a judicial sale of these roads and canals.

Fourth.—To your fourth question we reply: It those public works still belonged to the State, the lien could not be enforced for the reason that the sovereign character of the State exempts it from liability to suit. But all those works having passed into the hands of private companies and corporations, the lien may be enforced by suit. Such suit may be brought to the State Courts, or if the bond-holder is a citizen of another State, it may be brought to the Federal Court. It may be prosecuted to final judgment and execution, and the roads and canals sold, or their revenues sequestered, according to the order of liability above stated.

Fifth and Sixth.—It will be more convenient to us to answer your fifth and sixth questions together. It is necessary that we should first inquire whether the State is or is not liable to pay the $191,000 of bonds referred to in your fifth question. We understand that all of them appertain either to some one or more of the Wabash and Erie Canal loans, or to loans authorized in connection with the system of Internal Improvement of 1836.

All these bonds were comprehended within the provisions of the legislation you refer to, known as the Butler Bill, and might have been, but were not, surrendered under its provision. A proviso to the eighth section of the act of 1847, supplementary to the original Butler Bill, is as follows:

"*Provided, further,* That the State will make no provision whatever hereafter to pay, either principal or interest, of any Internal Improvement Bond or Bonds, until the holder or holders thereof shall have first surrendered said bonds to the Agent of State, and shall have received in lieu thereof certificates of stock, as provided

in the first section of this Act, anything in this Act to the contrary notwithstanding." (Laws 1847, p. 8.) If this proviso is understood as a Legislative determination that any bondholder who declined to accept the compensation should be paid nothing, it is manifestly obnoxious to the provision of Section 1, Article 10, of the Constitution of the United States, which provides that no State shall pass any ex post facto law, or law impairing the obligation of contracts."

The bondholders held the obligations of the State, redeemable in lawful money of the United States. It was not competent for the State to determine by law that it would redeem those obligations by paying one-half in its own five per cent. stocks, and the other half in canal stock. It had no more legal or moral right to do this than to determine that it would pay nothing. It could do either with the assent of its creditors; without such assent it could do neither.

Any attempt by the exercise of mere sovereignty, to force any such terms upon a non-assenting creditor, is but repudiation. A State can do this and defy its creditors, for it can not be sued. But while its sovereignty places it above liability to legal coercion, it does not place it above the obligations of public faith, or protect it from the denunciation of public sentiment. Its moral and legal obligation to pay remains unimpaired. There is simply no mode of *legal enforcement.*

That all such unsurendered bonds remain valid obligations against the State, notwithstanding any declaration to the contrary by the Legislature, is settled by the Supreme Court of the United States, the Court of last resort in such questions.

(Trustees of the Wabash and Erie Canal, v. Beers, 2 Blackf., 448.)

So far, therefore, as concerns those unsurrendered bonds referred to in your letter, held by parties who declined to become parties in the Butler adjustment of 1846–7, we think it very clear that they are valid legal demands against the State, and that it is the manifest duty of the State to recognize them as such, and to provide for their payment. As suggested already, the payment of those bonds can not be enforced by direct legal proceedings against the State. But as the holders of the bonds have a lien to secure their payment on property once owned by the State, but now owned by private persons and corporations, claiming under grants made by the State, the payment may be coerced by legal proceedings against the present

owners of the property to foreclose the lien. The case of Trustees of the Wabash and Erie Canal v. Beers, above cited, establishes the right of the bondholders thus to proceed.

All those unfinished public works were disposed of by the State for what was deemed by the Legislature an adequate consideration. In no case was the assumption of the payment of those bonds or any portion of them a part of that consideration. The works were not sold subject to any lien on account of this indebtedness. The present owners of those several public works are under no more moral or legal obligation to pay those bonds than they are to pay any other debt of the State. They are liable as other citizens are to pay their proportion of taxes for that purpose, and there their moral and legal duty in the premises ends. There is clearly no more justice in permitting this property in their hands to be sold for the payment of this debt, than there would be in confiscating any other private property of theirs for the payment of this or any other debt of the State. If the State should arbitrarily refuse payment of those bonds to the holders, and should permit the Wabash and Erie Canal and the other canals and roads covered by the lien to be sold under judicial proceedings to satisfy the debt, without making full and just compensation to the owners of the works so sold, it certainly would be justly chargeable with violation of good faith.

If out of the proceeds of such sales the bonds should be satisfied, the liability of the State would not be at an end. It would only assume a new and probably more serious form. The owners of the respective canals and roads so sold would immediately have a claim against the State, the justice of which would be too manifest to be denied. The attitude of the owners of the stock of the Wabash and Erie Canal towards the State is such that if that canal should be sold upon this lien, most serious embarrassments must result. It is understood that the owners of that canal stock desire that the State should resume the ownership of the canal, and re-assume the indebtedness adjusted under the Butler Compromise, and that they claim this as a legal or a moral right. This question has not thus far been considered either in the legislative or judicial departments of the State Government. But it is understood that many citizens wholly controvert the claim, and that a contest over the question, either in the legislative or in the judicial forum, is imminent. If the canal, or either division of it, should be sold upon both or either of the liens referred to, to satisfy the outstanding bonds of the State, and

if the creditors who had taken the canal in compromise of their debts, should thereupon demand a rescission of the compromise agreement, and that they be let in again as creditors, their demand would be entitled to serious consideration.

If they should urge that their bonds that had been surrendered by them to the State in exchange for the canal should be restored to them because the State had suffered the property to be sold and taken from them for the payment of its own debt to other persons, the argument would, to say the least of it, be plausible. And it seems not improbable that if the canal should be sold and taken from the possession of its present owners under the lien created by the State in 1836, and prior thereto, for a debt which it has neither paid nor adjusted the claim for a resumption of that part of her debt which was adjusted under the Butler Compromise, would grow in importance and gain great strength, and in the judgment of the people become practically settled in advance against the State, for it would be difficult, if not impossible, to say that the parties to that settlement should have neither their bonds nor the property which they agreed to receive in their discharge.

We have the honor to submit the foregoing as our professional opinions upon the questions proposed, and to say that it expresses the views of each of us.

Very respectfully,

HENDRICKS, HORD & HENDRICKS.